OFFICE SUPREME COURT U. S.
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Supreme Court of the United States.

OCTOBER TERM, A. D., 1880.

No. 598.

THE AMERICAN PRINTING HOUSE FOR THE BLIND,
Appellant.

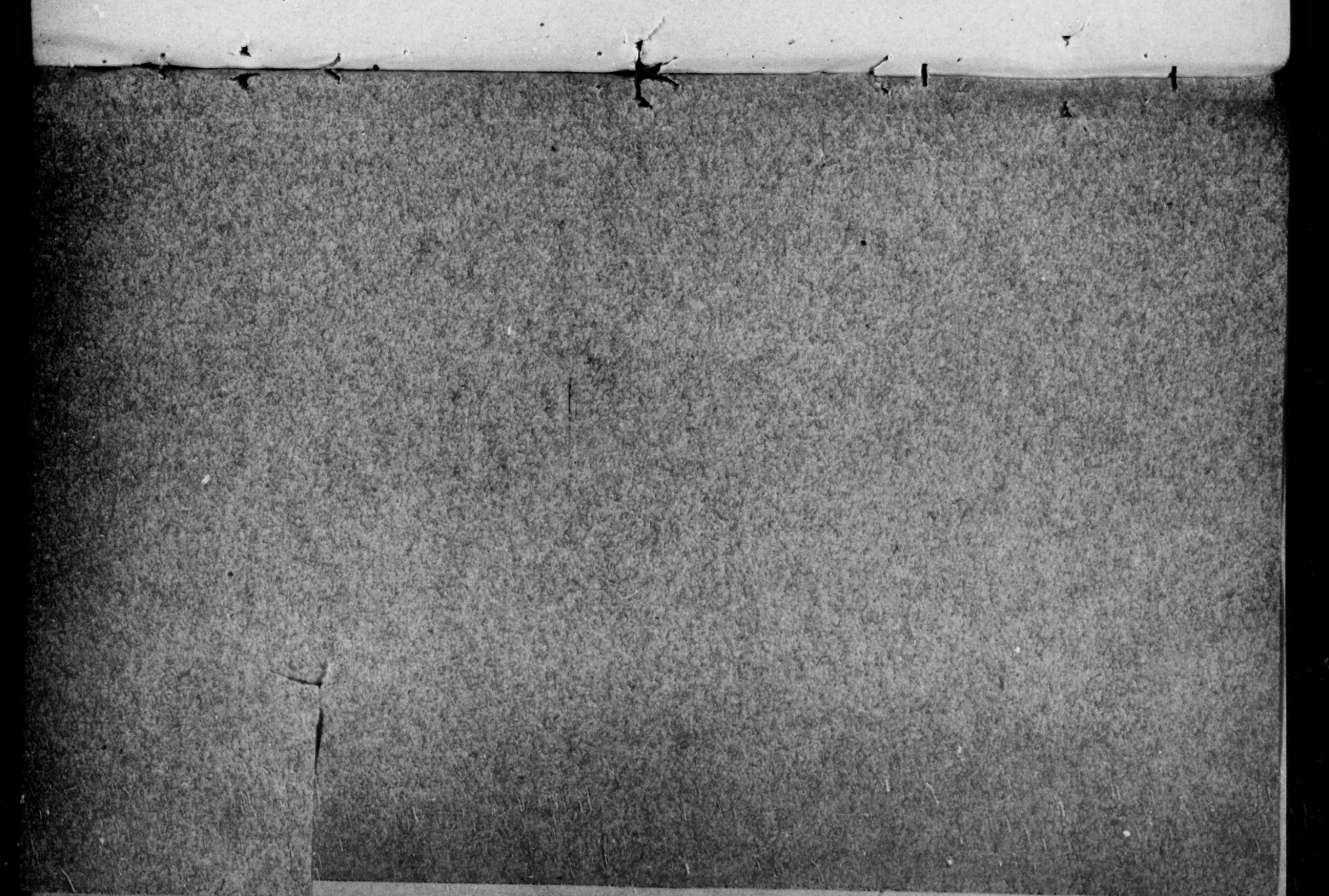
VS.

THE LOUISANA BOARD OF TRUSTEES, ETC., ET ALS.,
Appellees.

Supplemental Brief of Appellee.

J. D. ROUSE,
WM. GRANT,
Solicitors of Appellant.

Clark & Hopkins, Brief Printers, 119 Exchange Place, N.



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Supplemental Brief of Appellant.

The Hon. J. A. Campbell, who has filed an additional brief on behalf of the Louisiana Trustees, claims that the appellant did not raise $25,000 within seven years from January 14, 1859. Mess. Merrick & Foster, counsel for the same trustees, claim to the contrary at pp. 48 and 49 of their brief. They say that the *fact* that the complainant did raise this sum within seven years made the gifts absolute. Let the sworn answer of the Louisiana Board solve this disagreement between counsel. At page 19 of the Record is the following clause: "This defendant "further answering, says that he has been informed and "believes that the sum of $25,000 was raised as early as "1st of January, 1861 by the Mississippi and Louisiana "Corporation, and the said original Printing House for "the Blind, under their then acts of incorporation.

But, in the absence of any such admission, the proof shows the fact. At page 35 of the record, William T.

gives the fund to the Louisiana Trustees instead of complainant. To the complainant they say, *you* have forfeited your rights by accepting amendments to your charter; to the donors, *you* have been divested of your rights because the complainant *has complied with the conditions*, upon which you subscribed to the charity, and the fund is therefore ours. This reasoning works the confiscation of a charitable and trust fund, to the use of the trustee, a result never contemplated by the authors, and abhorrent to the conscience of a Court of Equity. The learned counsel for the defendants agree with us that the donors cannot reclaim their gifts, because complainant has accepted amendments, this not being made one of the conditions of their subscriptions. We hold it to be an indisputable proposition that if the donors cannot reclaim their gifts, these trustees cannot withhold them from complainants. The acceptance of amendments might under some circumstances work an abuse of the charity, though it is not pretended that they have that effect here. But even then, the remedy is by an action to *enforce the trust*. The donor cannot claim a return of his gift.

2 Perry on Trust, Sec. 744.

Brown vs. Meeting St. Baptist, Sec. 9, R. I. 177.

If these amendments work an abuse of the charity, it is the duty of the trustees to interfere by legal proceedings to prevent it. If they violate the rights of the members of the original Board of Visitors, the Courts will prevent the new members from intruding. But these issues cannot be determined in this case, inasmuch as all, those claiming the right to exrcise the visitorial power, are not before the Court.

But it is not pretended that there has been any abuse of the the charity. The purpose for which the fund was raised is being carried out by complainant successfully. The amendments may or may not interfere with the rights of the old Board of Visitors. They have not been accepted by the members of the old board. If they are unlawful the new members can be excluded. But this Court cannot, in advance of any issue being made between the old and proposed new members, determine that the rights of the Louisiana Board will be impaired. The new members may never claim a seat in the board. If the amendments are unconstitutional as claimed, they cannot operate to the injury of any one, much less can they be set up as a defense to this action.

The universal rule is that the trustee must convey the trust property to the beneficiary whenever the latter has performed the conditions imposed. So strict is this rule that the law presumes such conveyance has been made, notwithstanding it may not have been made in point of fact. The law also presumes that the property has been conveyed back to the authors of the trust upon failure of condition. This, says the Court, in Edwards vs. French, 21 Wallace, 147, common honesty and the law require him to do.

The law, operating by its own inherent force, executes what the trustee was bound to do.

Confessing as they do that complainant has performed the conditions imposed by the instrument of trust, so that the authors of the charity cannot reclaim their gifts, we submit that the trustees cannot refuse to execute the

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THE AMERICAN PRINTING HOUSE FOR THE BLIND, APPELLANT,

vs.

THE LOUISIANA BOARD OF TRUSTEES OF THE AMERICAN PRINTING HOUSE FOR THE BLIND, ET AL, APPELLEES.

Brief for the Louisiana Board, etc., Appellees.

E. T. MERRICK, and
GEO. W. RACE,
for Appellees.

L. GRAHAM, BRIEF PRINTER, 127 GRAVIER STREET.

SUPREME COURT OF THE UNITED STATES.

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Brief for the Louisiana Board, etc., Appellees.

The complainant called upon the defendant in its bill of complaint for an answer under oath. The answer was filed and states the grounds of defence on which the appellees rely. The material allegations of the answer are fully established. At all events we do not remember any particular in which it is controverted except as to collusion charged against complainant, which is of minor importance in the present state of the case. See Ans. Print., Rec. p. 14 to 21.

It was not to be expected that our opponents would state more of the answer or other facts than they needed for their theory of the case. We shall there-

fore endeavor to correct by a more perfect statement, some of the errors into which, we think, the appellant's counsel have fallen in their statement of the case.

The first step towards establishing a printing house for the blind, was taken about 1856 or '57, by Professor Dempsey B. Sherrod, deceased, late of Washington, D. C., who was instrumental in inducing the Legislature of MISSISSIPPI as early as 1857 to grant a charter to Judge Smith, Judge Sharkey and others, to establish a printing house for the blind. This was one year before the first Kentucky charter was granted, and to which the Kentucky charter refers. Print. Rec. 90 marginal, 301.

The thing proposed to be done was to establish a printing house for the purpose of printing books with raised letters for the blind.

The place "contemplated" by Mississippi for the publishing house was Louisville, Ky. The first was the principal and substantial object; the other a secondary matter and a mere mode of carrying the primary object into effect. The preamble of the Mississippi act shows further that the joint co-operation of other corporations was expected. It recites:

"And whereas to establish said publishing house "upon a permanent basis and with a sufficient capital, "contributions from various States of the Union will "be necessary; *to effect which object acts of incorpora-* "*tion like this will be applied for in other States*, the ob- "ject of which incorporation will *be to* AID in collect- "ing and effectually securing for such object, the "money which may be contributed *in each State*."

Therefore it is hereby declared, etc. See charter of the Mississippi corporation. Print. Rec. 119, 120.

The next step was an act of incorporation of the old Kentucky Board, and bearing in the title of the act, the same name as the present corporation bears, January 26, 1858. Print. Rec. p. 46, p. 49.

The recitals and provisions of this act (in accordance with Mr. Sherrod's view) also shows the contemplated co-operation of other similar corporations. It began: "Whereas, the State of Mississippi, has by law made "an appropriation of two thousand dollars to aid in "establishing in Kentucky a national institution to "print and circulate books in raised letters for the "blind: and whereas, said money and twelve thou- "sand dollars which have been subscribed for the "aforesaid purpose by citizens of Mississippi, and to "transfer said fund to said institution in Kentucky, "and whereas, it is anticipated, that other states will "*make donations, and incorporate trustees* TO AID IN THIS "ENTERPRISE." Be it enacted, &c. Print.. Rec. 46.

The tenth section of the act, in conformity with common fairness, made express provision for the joint management of the funds to be raised by a joint enterprise as follows:

SEC. 10. "*The presidents of the State Board of Trustees shall ex-officio constitute a board of visitors, each member of which, shall at all times be authorized to visit the printing house, examine the books,* and *investigate the proceedings of the trustees,* and the president of the *oldest State board of trustees,* shall at the written request of a majority of the visitors, call a meeting of the board of visitors *who shall be fully empowered to investigate the pro-*

ceedings of the trustees of the institution, and in case they shall find said BOARD *or any member thereof*, has mismanaged the affairs of said institution by malfeasance in office or neglect of duty, they may, a majority of three-fourths of all the members concurring, *declare the office or offices of said trustee* or *trustees vacant* and proceed to fill such vacancy by election from the citizens of Louisville or its vicinity. Notice of all meetings of the board of visitors shall be sent by mail to all the presidents of the State boards, and to all the trustees of the printing house at least one month before the time appointed for said meetings."

Print. Rec., p. 48, sec. 10.

The act of incorporation of the defendant, The Louisiana Board of Trustees of the American Printing House of the Blind of Monroe, followed and was formally executed and adopted under the *general* laws of the State of Louisiana, and with the expectation that it was to become a partner with a recognized and definite interest in and control of the charitable enterprise contemplated. January 3rd., 1859.

In the preamble as to the place, there is a recital that it was in contemplation to establish the printing house for the blind at Louisville, Kentucky. The Kentucky charter was inviting and fair. Rec. p. 137.

But the sixth section of the charter makes mention of and insists on the provisions of the tenth section of the act of Kentucky as a condition under which its cooperation would take place: It was a *sine qua non*. The sixth section of defendant's charter reads:

"SIXTH."

"THE TRUSTEES RESERVE to themselves *at all times the* "*right*, through their president, of visiting the estab- "lishment, or printing and publishing house at Louis- "ville, and *inspecting* the books and management of "the same and in conjunction *with the presidents of* "*other boards* that may be formed, *the supervision* and "*administration* of the affairs thereof in accordance "with the *tenth section* of the charter of the Trustees of "the American Printing House for the Blind, as incor- "porated by the General Assembly of the State of "Kentucky."

In the language of the section *the right is reserved*, therefore it has not been *granted* to another.

The recitals and provisions of these acts show, that in 1859, as well as 1860, that three bodies corporate, the Mississippi Board, the Kentucky Board and the Louisiana Board, were acting in concert under a clearly implied, if not clearly expressed, understanding to carry into effect a common object. The rights and powers of each were defined. They were in fact partners in a common enterprise. Each of them had a vote in the last resort on the management of their common affairs. The value of the vote of the Louisiana Board was, at that time, *one-third* of the whole And this right of one-third control was, as we have just seen, *expressly* reserved to the Louisiana Board by the tenth section of the Kentucky act of 1858, and by the sixth section of the Louisiana charter of 1859, above set forth, making said tenth section an integral part of itself.

While things remained in this condition the collections and subscriptions were obtained with facility so that the general agent, Professor D. B. Sherrod reported collections of cash over $25,000 and subscriptions of over $50,000, in 1860. P. 90, transcript, paging 299.

In 1861 the Kentucky Board procured a new charter among other things, with partial change of trustees and a radical change and limitation if not an annihilation of the powers of the other co-operating corporations.

By the original Kentucky charter (Chapter 115, 1858), the name and style of the corporation was declared by the act to be the "Trustees of the American Printing House for the Blind." Print. Rec. p. 47. This suit is brought under the new charter as the "American Printing House for the Blind" as if it were the same corporation. But of the trustees named in the act of 1858, John Milton and H. T. Curd, were omitted from the new act, and two new trustees named, viz: William Kendrick and John C. J. Barret (the last of whom makes some figure in this litigation) were added. Please compare the two acts. Print. Rec. 46 and 49.

Section *ten* of the new Kentucky charter treats of another subject altogether, and would leave article six of defendant's charter meaningless if it were to be held that this new Kentucky charter could be forced upon the Louisiana corporation against its will as forming any part of the Louisiana charter.

But the new Kentucky charter while changing the

personnel of the board of trustees, changed *the beneficiaries* of the institution also.

In the original charter of 1858, it was not contemplated to print in raised letters for the blind resident in any country beyond the borders of the "United States." Print. Rec. pp. 47 and 48, Secs. 8, 9 and 10. In the new charter they were to publish for the blind generally. Rec. p. 49. Transcript paging 163, 164. And all the states of "North America" were admitted to an interest in the publishing house on certain conditions. Compare Print. Rec. pp. 48 and 50. Ontario and its institution for the blind and Nova Scotia and its institution seem entitled to a vote under the new charter as well as Mexico and Central America.

In the original charter the treasurer was compelled to give bond in the penal sum of not less than *twenty thousand* dollars. In the new charter he was only required to give "satisfactory security" (to the Louisville Board). Compare Sec. 4, p. 47 and Sec. 4, p. 50.

In the old charter the corporation could not loan money on real estate unless *it was double the value* of the money lent. In the new charter they were authorized to loan money on real estate *without any restriction* as to valuation. Print, Rec. p. 47, sec. 5, p. 50, sec. 5. The old charter conferred certain rights on persons donating to the corporation five hundred dollars and upwards. The section number *nine* granting these rights is entirely omitted from the new act of incorporation and in the place of section nine is substituted a radical modification of original section ten of act 1858, already copied at length in this brief.

The new charter, instead of leaving to the three or

more corporations raising the money to manage the printing house virtually deprives the two corporations of the States of Louisiana and Mississippi, then the only other corporations existing, of all control over their funds. Instead of the three boards, through their presidents, controling the business, the control is given *to all superintendants* " of *State institutions* devoted exclu- " sively to the educations of the blind, and the Gover- " nors of States that aid in sustaining the American " Printing House for the Blind and the presidents of " the State *auxiliary* boards of trustees who are to con- " stitute a board of visitors " in the place of " the presi- " dents of the State boards of trustees," established by the act of 1858. As the business stood under the old act by its tenth section as we have seen, the Louisiana Boards had a control equivalent to one-third, and with the adhesion of either Mississippi or Kentucky, the control of affairs. See p. 48.

Under the new charter, the Louisiana Board and its funds would be subjected to the control of fifty or sixty, or one hundred persons, who have no responsibility in collecting or managing the funds, and it is no longer recognized as an equal but declared to be an auxiliary. Then again they are deprived of the quorum and the means of organization, and in fact of *the vote* which was given by the act of 1858, for in order to constitute a quorum, the new charter provided that " *Representatives from a majority of the States*, that con- " tribute to the support of the American Printing House " for the blind, shall constitute a quorum of the board " of visitors and *each State shall* be allowed *one vote in the action of the board.*"

Print. R., p. 5. This was no doubt intended to give the Kentucky Board entire control of the printing establishment. No sane man could expect that a majority of the governors of the States giving aid would abandon their governments, and that the superintendents of all the State institutions of North America, for the education of the blind, would leave their charges to form a quorum at Louisville to superintend the management of a single printing press! If the emperors of China and Russia, and the Mikado of Japan had been made the board of visitors, and a majority required to attend to constitute a quorum it would have been about as reasonable. It would have been altogether another affair as to the Louisiana and Mississippi Boards furnishing such large sums primarily *for the benefit of the blind of their respective States.* P. 41–42. The printing house was to be founded for them as much as Kentucky, and their institutions of education for the blind were to receive in proportion to the funds raised by them. Rec. p. 47; Sec. 7, Original Charter, print. p. 51.

Again: suppose the superintendent of the Baton Rouge Blind Asylum and the Governor, under the new Kentucky charter differ from the President of the Louisiana Board, the latter loses his vote. And supposing this not to happen, what is the value of one vote in an assemblage of sixty or seventy persons of adverse interests, and who are not charged with the collecting and managing the corporate funds? Would they take the care of the money that the boards which raised it would?

By 1861 the Louisiana corporation had secured

$16,136 23 in money which was loaned to the New Orleans Savings Institution, over which that philantropist, Dr. W. M. Mercer was president, and where it made six per cent. interest, half yearly, and at the time this institution was started, had accumulated a sufficient sum to establish an independent press.

From the time of the passage of Act No. 299, of Kentucky, in 1861 (fifteen years), *there was no intercourse between the* Louisville and Louisiana Boards, *except the purchase* of a few books by the latter from the former as from a stranger, the books being paid for. It seems that Professor Sherrod had informed Mr. Foster of the Louisiana Board, after the war, that there was some change in the Kentucky charter which would prevent the former from paying over the funds to the latter institution, but it appears that the amendatory act of the Kentucky legislature was never seen by the Louisiana Board or its counsel until after the commencement of the vexatious litigation of certain donors instigated by one of the Louisiana agents in 1860 in soliciting and collecting the funds, and a teacher in the Asylum for the blind at Baton Rouge in pay of the State. These two men were, it seems, to get fifty per cent. of all the money they could recover back for the donors, they paying all the costs. One of them had been paid 15 per cent. for collecting the money originally.

The circulars addressed to the donors and the contracts to be signed by the latter were in the names of a legal firm in the city retained by those enterprising country gentlemen. At least this is the version of the firm as we understood them, and we are willing to accept their statement. A copy of this circular is found on page 106 of printed record.

About the month of February, 1876, (the circular having produced some effect) a number of suits were commenced in the names of *individual* donors at the instance of those gentlemen of the country, some before Justices of the Peace and others in the State District Courts. See Print. Rec. pp. 15 and 16 and 110; Transcript paging 369, 370.

Exceptions (pleas) or answers had to be filed in ten days after service of process in each case.

The suits were placed in the hands of E. T. Merrick, counsel for the Louisiana Board, for defence. The ground of attack in the pleadings was *the allegation* that the $25,000 mentioned in defendants charter had not been raised in seven years, neither had the publishing house been established in nine years. See exhibits E. E. and G. G., pp. 122, 123.

Inquiries were made at the instance of E. T. Merrick, of the Kentucky house as to the amount of funds raised by the various corporations and what had been done towards establishing a printing house for the blind.

About the first day of March, 1876, Mr. John G. Barret, treasurer of the present Kentucky house, presented a resolution from that body, and demanded the money. It will be seen that the resolution purports to be given by the corporation created in 1858. It is as follows. We give it in full:

"At a meeting of the Board of the American Printing House for the Blind, on the 29th day of February, 1876—present, Messrs. Bullock, Bell, Barrett, Sherly, and Kendrick, the following resolutions were unanimously adopted:"

"Whereas, the American Printing House for the Blind, incorporated by an act of the Legislature of the *State of Kentucky, the 23d day of January*, 1858, *has now and has had since 1st day of May*, 1861, *more than twenty-five thousand dollars in actual subscription;* and whereas, by the charter of the auxiliary institution *in the State of Louisiana, it is provided*, that the funds raised in that State shall not be paid to the Board of the American Printing House for the Blind, *until officially notified of the fact that said sum of twenty-five thousand dollars* has been subscribed as aforesaid, now, 1st. Therefore be it resolved, that this *Board notifies the Louisiana Board* that said sum of twenty-five thousand dollars has in fact been raised by the American Printing House for the Blind, and is now being appropriated to the uses and purposes contemplated by the charter of said institution.

2d. That John Barret, Esq., treasurer, be and he is hereby authorized to present the foregoing resolution to the Louisiana Board, respectfully requesting their co-operation as contemplated in their original charter, with the American Printing House for the Blind."

"W. T. BULLOCK,"

"President of the American Printing House for the Blind."

"Attest: B. B. HUNTOON,

Print. Rec., p. 122. Secretary."

In this resolution of the Kentucky Board there is no reference made to the amended charter. The charter of 1858 was alone stated.

About the first day of March, 1876, Mr. Barret, the bearer of the resolution, had a conversation with Mr. Foster, the Secretary of the Louisiana Board, who says.

"We had considerable conversation in regard to D. "B. Sherrod and his actions I think he (Barret) sta- "ted to me that Sherrod had represented they had "materially changed their charter, the organization or "the association. *He stated this was not so; that the "charter was the same.* There had been no material "alterations. He stated further that Sherrod had acted "very badly and was not worthy of confidence. A "good deal of remarks in that line." Rec, 89; paging of transcript 297, 298.

Mr. Barret also saw the counsel of the Louisiana Board of Trustees and assured him "*most positively*" "that the present Board of the American Printing "House for the Blind was the same institution and cre- "ated by the charter granted in 1858." Print. R. 111; Trans. 373.

In answer to the depositions in the State Court W. D. Bullock in March, 1876, testified to the same effect.

2. Question and answer in the Dapney case,

"Has the printing house contemplated in said charter" "(the Louisiana charter)" ever been established, if yea, "where and when was it established?" He says: "Yes "sir; the trustees *named in its charter* met at Louisville "February 12, 1858, and elected officers; stated meet- "ings had been held ever since by *its board of trustees*, "and press, type, paper and other materials for print- "ing purchased, in 1863." Print. Rec. 111 and 112, Transcript paging 376.

The assurances of Mr. Barret led to the belief on the part of defendant's counsel, that the present charter and board of the Kentucky house, were the same established in 1858. The answers (as evidence) to interrogatories which had to be prepared in the Foley case in the State Court, were made under the erroneous impressions produced by the agents of the plaintiffs on Thomas A. Adams and himself, that there had been no material change in the charter. See testimony of E. T. Merrick. Print. Rec. 111.

These answers are only those of Thomas A. Adams, the president, to interrogatories on facts and articles, and do not supply the place of an answer to the merits, the *contestatio litis* of the civil law to which great importance is attached.

If such interrogatories *are taken pro confesso*, it is not a default or an issue on the whole case, and does not dispense with the necessity of forming the *contestatio litis* by a judgment of default if no answer to the merits be filed. Hernshaw & Sons vs. Flannery & Co. 27 An. Reports, 671.

They are in the nature of evidence, and not the act of the board, and *in themselves*, when examined, will be found only to speak of the original corporations in existence when the subscriptions were obtained. Although made under the erroneous impressions produced by Mr. Barret and the resolution of the Louisville board, they do not, fairly, bear the construction placed on them by complainant, who was instrumental in producing the erroneous impression early in March, 1876, at and before the time the answers of Mr. Adams were filed (March 13, 1876), the copies of the two Kentucky charters not

having yet been seen or come to hand. Defendants, in order that *the whole* of the answers just as they are, may be seen by the Court, have placed them on file. See Print. Rec. p. 22-24. They respond to interrogatories which also refer to the condition of things existing in 1860. See printed Rec. p. 124.

Complainant's counsel are in error, as we have said, in asserting that defendants' counsel had examined the Kentucky charters at this time (viz: when Mr. Adams' answers to interrogatories were filed), but not critically, and that Mr. Foster had seen them in 1872. The learned counsel, as they do not refer to proof, may have intended this assertion only as belief, but it is unfounded.

A brief of defendant's counsel in one of the State Court cases, filed long after Mr. Adams' answers, on the trial of the exceptions of want of parties in one of the State Courts, was produced by complainants before the examiner as evidence in this case. When *that brief* was used in the State Court, the the copies of the Kentucky acts were produced in one of the State Courts and had been casually glanced at by the counsel to see if properly authenticated, but they had not been *critically* examined.

The witness says, "The two authentic acts of the "Legislature of Kentucky, the one of 1858 and the one "of 1861, were returned with the commissions on the "*twenty-ninth* day of March, 1876, *some days*" (sixteen) "*after the* filing of the answers referred to." Print. Rec. 111. Trans. 376. At the time the answers were filed *the brief* of Messrs. Richardson & Magruder, pointing out discrepancies, *had not been seen*. P. 112, Trans. 377.

Witness says "it was in the argument of the case "I first perceived the difficulty. In all probability "the brief (which was filed as drawn up by myself) "was done on the statement of the evidence of the "witness, without *any critical* examination of the two "acts of incorporation." P. 112, Trans. 378.

If, in a case in the State Court, *between other parties*, a counsel should be so disingenious and unfair as, knowingly, to misrepresent the facts under the mistaken view that it would benefit his case, it would be difficult to find any safe principle on which such erroneous statements *inter alios actae* could be offered in evidence by way of estoppel against the client.

Much less would it be the case where the party, seeking to avail himself of the error of counsel, had produced the result by his own mistatements or mistakes. How could such error of counsel in argument prejudice one not a party to the process?

It would have been better to have left this brief of E. T. Merrick out of the record, and saved the necessity of explanatory testimony of counsel. What counsel says arguendo in another man's case is not evidence, much less an estoppel. See p. 141. But we do not think our learned adversaries have understood the testimony, or they would not assert that the act of the Kentucky Legislature had been seen but not critically examined by defendant's counsel, when Mr. Adams answered the interrogatories.

It had not *then* been seen at all; afterward it had been seen but not critically examined when defendant's counsel argued the exceptions (want of proper parties) in one of the suits between other parties in the State

Court. At that time he had not examined the act of 1861, and relied on the statements of Mr. Barret and Judge Bullock as true.

But complainant's counsel (notwithstanding Mr. Foster's testimony to the contrary) declare, that the answers of Mr. Adam's on facts and articles were not made in ignorance of the actual change in the Kentucky charter, because they say, Mr. Foster, had written a letter in 1872, in which, speaking for himself, he said that amendments to complainant's charter *might be found* materially to change the relation between the two corporations. If Mr. Foster had had any other information than the statement of Mr. Sherrod, that there had been some change in the Kentucky charter which would prevent co-operation with it, if in fact, he had seen the new Kentucky charter, he would not have spoken so doubtfully about it.

The letter really corroborated Mr. Foster's testimony, if the high standing of that gentleman needs any corroboration. But there is another side to be considered. Judge Bullock admits that he was instrumental in procuring the new charter. Mr. Barret evades speaking on this subject, because he says he does not know what is meant by "instrumental" in the question. But they are both officers of the new corporation. Common courtesy, honesty and fair dealing required that the new Kentucky house, if it intended to maintain any relationship with the Louisiana corporation, should, officially, notify the latter of the change in the charter and the change in the board of trustees. *They ought, at least, to have sent a copy of the new act of*

incorporation which they had prepared. If they had done their duty in that behalf, there would have been some record of what they had done. But it is not pretended that the new Kentucky corporation, or any one else, on their account, ever communicated the radical changes made by the new charter, to the Louisiana Board. On the contrary, the new Kentucky corporation most sedulously withheld the information. Indeed their agent, Mr. Barret, in 1876, denied the existence of the change, and declared what Mr. Sherrod had said on the subject to Mr. Foster to be untrue. It seems unfair after having denied Mr. Sherrod's statements, and caused Mr. Adams to answer accordingly, as they say, to then turn around and argue that the information from Mr. Sherrod ought, not only, to have been believed, but persisted in, and that it was wrong to have given any faith to Mr. Barret's assertions.

As we have already said, the amendment made in the Kentucky Charter,—by which a board of visitors, which were never, in all probability, likely to meet, was provided, in the place of interested partners furnishing the money and certain to look after their common interest,—was manifestly made to give the Kentucky Board the entire control. For no sane man could have believed that a majority of *the Governors* of the States contributing, and of *the superintendants* of State institutions, would ever be convened, as a board of visitors, at Louisville; the change made by the new charter was, therefore, equivalent to a release of all outside supervision of the Kentucky Board. This change was no doubt very agreeable to the new board, and they may have preferred it to receiving the money of the

Louisiana & Mississippi Boards, with the burden of submitting to their voice in its management. It was, no doubt, made at the instance of some of the Trustees.

Judge Bullock says he was part instrumental in securing the passage of the act. p. 37. Mr. Barret, in answer to the same questions, viz: "Were you or "either of you instrumental in getting the act of the "legislature of the State of Kentucky, approved April "3d, 1861, No. 299, passed? What were all the ob-"jects in getting that act passed? State all the objects." Answers, "I do not comprehend what you mean by instrumental." p. 45. To fully understand the testimony of Messrs. Bullock, Barret and Huntoon for complainants, it should be carefully read cross-interrogatorry, and answer by cross-interrogatory and answer. We think we may infer, notwithstanding Mr. Barret's want of comprehension, that he had something to do with the procurement of the new act by which he was introduced into the new Board in the place of one of the old trustees turned out.

The Louisiana Board was organized in 1859; had raised probably $15,000 in money in 1860, and a publication was made by Professor Sherrod that year in the name of the "American Printing house for the Blind," containing the names of many hundreds of Louisiana subscribers and over twenty two thousand dollars of *subscriptions* of which $11,000 or $12,000 were paid in money. See Print. Rec. 125–137. It seems impossible that this document (printed at Louisville by the order of the Mississippi Board) could be unknown to the old Kentucky Board, for W. F. Bullock admits that Mr. Sherrod was in the employ of the

Louisville House some months in 1859 and 1860. P. 37.

Yet the amended Kentucky charter makes no allusion to the Louisiana Board nor any claim on it and the Kentucky Board is reorganized with a different body of men from the Board of 1858, as we have seen. Print. R. 49.

From the time of the passage of the act of 1861, changing the rights of the co-operating Boards, neither Louisiana or Mississippi, recognized the right of this new Board to control their funds. And the Louisville Board never notified the Louisiana Board of the change in the charter, or sent a copy of the act of the Legislature, as fair dealing might seem to require.

THE PLEADINGS.

We do not wish to restate complainant's bill and its amendment.

But there is no allegation in the bill that the present Kentuckey Board ever made any expenditures, or incurred any liabilities on the strength of, or account of, the funds in the hands of the Louisiana Board.

There is no allegation that there is any particular debt to be paid, or any particular thing needed to be done, and no estimate is given of what is required, but it is stated in a general way that complainant needs the whole $30,200 to maintain itself in the prosecution of the charitable work it has undertaken.

The complainant's counsel are in error in saying that all the donors bringing suits are parties to the bill.

They are also in error when they say, as they do on page 8 of this brief, that the "defendant admits that it

"did file an answer to certain suits plead against it by "two of the donors of the fund in the Sixth District "Court, setting up in defence that the fund in opera- "tion belonged to complainant."

There was no admission by defendant that the fund belonged to complainant. Complainant seeks to confound things in this statement.

The *defendant* did not file an *answer* in the State Courts. It *excepted* for want of parties. Answers *to interrogatories* are not an answer to *the cause.*

H. B. Foley, to make *proof* in the State Court in his case, filed interrogatories and required Thomas A. Adams, the president, to answer. The five questions are on page 124 of the Record.

The answers of *Thomas A. Adams* are on pages 22 and 24 of this record. The answer to the interrogatories are, as Mr. Adams says, the only ones made. p. 20 to 21. The interrogatories refer to a *period anterior* to the creation of the charter of 1861. Mr. Adams was not talking of the new board (bearing the name of the old board), because he was not aware of the existence of any such change, and the time referred to did not permit a reference to that which did not then exist.

The answer of the Louisiana Board of Trustees to the complainant's bill, as amended, is admitted to be sufficient by a replication to it. Being under oath it is evidence in all matters responsive to the bill.

By the amended bill, complainant made Henry B. Foley a plaintiff in the Fifth District Court of the State defendant; Valsin J. Dupuy, a plaintiff in the Sixth District Court, Nathaniel Cooper (one of the plaintiffs before a Justice of the Peace), Herman

B. Magruder and Frank J. Richardson, in their own right and as agents and attorneys in fact for all parties preferring claims against the Louisiana Board, and Henry C. Dibble, Assistant Attorney General of Louisiana, as well as the American Printing House for the Blind and the University of the Blind, incorporated by Congress at Washington also defendants. Print R. 11.

All these defendants (except the last) file an answer and set up as a defence, the allegation that $25,000 was not raised in seven years and the printing house was not established in nine years. They call *their answer a cross-bill* and pray for judgment against the Louisiana Board of Trustees for $30,200, and general relief. P. 9 and 10.

No service of process was ever prayed for or made under this anomolous paper; neither did the Louisiana Board, a co-defendant, undertake to file an answer to the same, but after the Louisiana Board of Trustees had answered the *complainant's bill*—(pp. 14 to 21)—*those defendants* filed what they called a replication to that answer (the answer of the Louisiana Board to *complainant's bill*). See their second replication to the same answer. P. 30.

We leave this part of the case without comment.

It is manifest, therefore, that the real issue in this case is this: Has the American Printing House for the Blind of Kentucky, as now organized under the charter of 1861, the legal or equitable right to take the fund collected by the Louisiana Board of Trustees,

and under their management for so many years, out of their hands?

We say: No!

ARGUMENT.

I. The Louisiana Board is in possession. *Melior est conditio possidentis.* And it has the legal title to the fund. Among other things by the third article of its charter it is declared *that*, "*they shall be empowered to* "*receive by donation, bequest, purchase or otherwise, and to* "*hold and use* properties, real and personal, to the "amount of *one hundred thousand dollars.*"

They are permitted to buy, to receive by donation or bequest and to hold" (that is retain) "*and use* property, real and personal, to the amount of $100,000," p 138.

To whom did the Louisiana charter give the discretion to do these things or judge of their necessity? The clause certainly means something, and cannot be validly expunged from the charter, and must unquestionably give this right to judge to the Louisiana Board.

As *things originally* stood, it was probably intended that the Louisiana Board should have some agency with the other co-operating corporations, in judging of the times and the necessity of sending funds to their *intended agent* the Kentucky Board.

II. It is very clear from the SIXTH article of the charter of the Louisiana Board, that that corporation, by the express reservation in its charter, which we have copied, intended to retain its *pro rata* control over the joint funds to be invested at Louisville under the benevolent copartnership first established by the Mississippi, original Kentucky and Louisiana Boards.

That the purposes of these three corporations appear only from the preambles and provisions of their respective charters, does not the less make the acceptance by any one of them of the provisions of any of the other charters, a contract to comply with the other conditions of the same charter.

Hence it was not possible for the Kentucky Board to avail itself of any of the advantages of the Louisiana charter, without assuming the burdens imposed by the same charter. Common justice requires that much. A legatee cannot take under a will without assuming the charges upon the legacy. The grantee under a deed by accepting must comply with the conditions of the grant.

So it was not in the power of the Kentucky Board to accept the advantages of the Louisiana charter, and repudiate or reject the conditions of that charter.

Suppose that there were facts from which it could be inferred that the Kentucky Board did, in 1859 and 1860, accept the Louisiana charter in good faith. Then it follows that the Kentucky Board of 1858 accepted the conditions upon which the funds were to be paid over; viz: it granted, by such acceptance, the right of visitation to the Louisiana Board as effectually as if such agreement had been in writing.

For Mr. Bullock says that at that time Mississippi had raised $14,000, Louisiana Board had raised $17,000 and Kentucky had raised by subscription only $7,400. Rec. 35. Transcript, p. 116.

Was it not meet and fit, that the Louisiana Board, furnishing more than double the money, furnished by the Kentucky Board, should have the voice of one in

three in managing these funds belonging to the three, as she insisted in article six of her charter?

Again, suppose the old Kentucky Board, which held out the inducement to the Louisiana Board to go into partnership with it, had never accepted the Louisiana charter; would the new corporation, who had no corresponding *tenth* section, and did not even exist when the Louisiana charter was granted, have a right to say: We are the corporation for your money, and have the right to take it against your will, out of your hands, and place it beyond your control—although we had no existence and were not contemplated or thought of when your charter was created?

III. Yet we understand complainant's counsel to maintain that the new Kentucky Board has this right. We believe that they concede, however, that the rights of corporators cannot be impaired in general without the consent of the corporators. But they contend that the Kentucky law, in force in 1868, gave the Legislature of that State the right to amend the *Kentucky* charter, and that having done so, the Louisiana Board are bound by the amendment and must lose the rights which otherwise they would have had under their own charter. Conceding for the moment this right claimed for Kentucky, would it give that Legislature the right to change the *Louisiana charter* where no such provision of law exists? The Louisiana Board and the individual members of the same are citizens of Louisiana and owe allegiance to their own State, and are entitled to protection from the same. How then can Kentucky act extrateritorially and annihilate and destroy article six of the Louisiana charter?

Possibly the article six was put in as a protection and a guard against what has been done. Was it not lawful in the Louisiana Board to make the condition and reservation? When that condition and reservation are taken away, has she not the right to say, without my consent you are making a new contract for me. *Non in haec foedera veni.* The laws of my domicil say you cannot, by any act of the legislature, violate the obligation of my charter. Now you appeal to those very laws of my domicil to enforce a law of another State violating my charter when, the State of which I am a citizen, could not, by any power in it, perpetrate such a violation of right. The comity of States does not extend quite so far, and the demand made to a Court of Equity to help you has a sound unusual on that side of a court of justice. Here is a corporation of Kentucky invoking a law of Kentucky as repealing a Louisiana charter, and then asking a court of justice, sitting within the State of Louisiana and administering her laws, to enforce the Kentucky statute to the detriment and violation of the rights vested under the Louisiana charter, in its own citizens who have never been an hour within the territory of Kentucky.

Is it equitable on a capital of $7,000 to take, in violation of the terms of the copartnership, from a partner who furnishes $16,000, all voice and control in the common business? May he not withdraw?

How did the matter originally stand? Mississippi created an intellectual being, having certain rights for the benefit of the blind of that State, as a person derived from the Mississippi law.

Kentucky created another intellectual person having the right to contract and do certain acts.

Under the Louisiana law, there was created another intellectual person for the benefit of the Louisiana Blind. These three were by their respective charters *three distinct* and *independant* persons and capable of contracting with each other, and binding themselves by such contracts, and those contracts, whether express or implied, are contracts under the protection of the Constitution of the United States. And if the Legislature of Kentucky could amend the charter of that Company, it would not relieve it from its obligations and duties any more than the like action would relieve a city or other municipal corporation from the obligation of its contracts.

The corporations combining for the purpose of establishing a publishing house for the blind may be likened to railroad corporations created to build a road through different States. This Court says:

"The jurisdictional effect of the existence of such a "corporation as regards the Federal Courts is the same "as that of a co-partnership of individual citizens "residing in different States."

Railroad Co. vs. Harris, 12 Wal. 82.

Kentucky is crossed by great trunk lines of railways and covered with nets of telegraph wires, doubtless by co-operative corporations created by the commonwealth of Kentucky and outside corporations which have joined them in their work Can it be pretended that the State of Kentucky can so modify the Kentucky charters, as to enable those corporations to "gobble" up the funds of the neighboring corporations

and give nothing in return? Can it release the Kentucky corporations of their obligations?

We have no idea that the Kentucky act of 1856, can have any such influence on parties resident in Kentucky, much less on non-resident citizens of other countries.

The proviso of the act of 1856 is, "Provided, that "whilst priviliges and franchises so granted may be "changed or repealed, no amendment or repeal shall "impair other rights previously vested."

In the very case cited by our adversaries from the Kentucky reports, we find the following as the first head note:

1. VESTED RIGHTS—"The charter of a private cor- "poration *may vest rights* in the corporators and stock- "holders which no subsequent legislation can impair "or diminish."

City of Covington vs. Covington and Cincinnati Bridge Co.; 10 Bush. 69. On page 79, same case, the Court says:

"The Legislature of Kentucky had the power to "create this corporation, but could not invest it with "the right to construct any part of its bridge on the "soil of Ohio, and recognizing this fact required the "corporators to obtain an act of the Ohio Legislature "confirming the act of incorporation. This State had "not only the power to make the grant, but to give it "all the rights and powers the legislators saw proper "when not in violation of Federal constitution; but "when attempting to exercise these corporate rights "*within the boundary of another State it must be done* "*with regard to the laws of that State.*" 10 Bush., 79.

The same volume of Bush., p. 609, the Supreme Court of Kentucky, speaking of the case of the Cumberland and Ohio Railroad Co. vs. Barren Co., said:

"The power to pass the amendment under consid-
"eration in this case is not such a power as was at-
"tempted to be exercised in the passage of the amend-
"ment to the charter of the Western Baptist Theologi-
"cal Institute. In the case of Sage vs. Dillard (15 B.
"Mon. 340), this Court decided that the Legislature
"under the guise of an amendment to that charter
"attempted to take the '*charity out of the hands of*
'*those to whose care and foresight* the founders confided
'it and to place it in the hands of strangers who never
'breathed perhaps a single breath of vitality into the
'institution either to impart to it life or growth;' and
so the attempt to take the charity away from *other Kentuckians* was not allowed under the act of 1856.

How then can it be extended so as to take away the rights carefully specified and mentioned in sixth section of the charter of the Louisana Board, and give it in charge to another class of men? Rec. p. 138. Indeed, that Court proceeds to say of the amendment which was permissible in Kentucky in that case, then under consideration: "The amendment to appellent's charter
"(the Cumberland and Ohio Railroad's charter) does
"not direct the operations of any of its *property, rights,*
"*priviliges, or franchises and does not interfere with, or*
"*abridge its right* to control its business affairs by and
"through *its chosen agents and representatives.* It is
"such an amendment as the Legislature had the pow-
"er to make and it cannot be rejected by the corpora-
"tion." 10 Bush., 610. Now if it were possible to

give an extra territorial effect to the Kentucky laws so as to amend the SIXTH section of the Louisiana charter and deprive that corporation of the rights therein expressly reserved, as contended for by complainants, it would take from the control of the Louisiana Board *its property* and give it into the charge, custody and keeping of a body of men never contemplated by the charter.

In the case of Sage vs. Dillard, 15 Ben., Man., 340, the reservation was in the charter, it reserved to the legislature the right *to alter, amend*, or repeal the act of incorporation whenever it might deem it right to do so, pp 341, 358, as stated by the Court.

It seems the legislature passed one amendatory act adding other trustees, making the number 21, which was very satisfactory to the old board and was accepted by them. *Another* amendatory act was passed, adding sixteen more trustees, the then board of trustees repudiated the second amendment which added another number of trustees to their board.

The contention in the Supreme Court of Kentucky was, whether such an amendment could be made against the will of the existing board.

That Court said:

"Then did the legislature, which granted the charter, or the trustees who were incorporated and to whom the grant was made, contemplate that any future legislalature would have the power under the right reserved, to assume to themselves the right of creating additional corporators or adding new parties to the contract without the consent of those with whom the original contract was made? Does the right to "alter, amend or

destroy" a contract include the right to add other parties and invest them with the same privileges and franchises conferred upon the original parties? The power to alter or amend a contract in our conception is to change it *as between the original parties* and such others only as have been permitted *by their mutual consent* to come into the enjoyment of *its benefits and privileges not to compel one of the parties to operate in conjunction with others and share* with them the privileges and benefits of the contract. When such a power is attempted to be exercised by one of the parties over the other, has not the party upon whom the attempt is made a right to say "alter or amend or even destroy the contract subsisting between us, but *do not under the semblance of an alteration or amendment force us to co-operate with men (it may be) between whom and ourselves there cannot be peace, harmony and concert of action.*"

"It is easily seen that the great enterprise in which the corporators embarked, that of educating the Baptist ministry in the valley of the Mississippi, might thus be thwarted, and the whole scheme weakened and crippled in its energies. Surely no such alteration or amendment as that made in 1848 was contemplated by the parties to this charter or contract under the reservation contained in the original act. *Can it be properly denominated an amendment at all? Is it not rather a new contract?* Duncan Justice, in the case of St Mary's Church, 7th S. & R., 562, used this language: "My opinion is that the proposed amendment *striking out an integral part of the corporation and substituting another class of men in their stead is not a lawful amendment, is not an amendment at all, but the grant of a new corporation*

and a new charter. Again, he says on page 564: "The charter is a contract between the State, the founder and the objects of charity, all of whom are bound by its terms. The contract on the part of the Government is that the property with which the charity is endowed shall be vested in a certain number of persons and their successors designated by the founder to subserve the purposes of the founder and to be managed in a particular way. *But if alteration changes the character of the trustees, then they are not the same persons the grantors* intended should be the managers. The same identical franchise that has been before granted to one cannot be bestowed on another, for this would prejudice the former grant." Sage & Co. vs. Dilland, 15 Ben., Man., 360.

The consolidation of two corporations it has also been held by this Court creates a new corporation.

See Shields vs. Ohio, 95 U. S. 319, cited by complainant.

The changes made in the new charter, which come particularly under this view of the Kentucky law, and relieve the Louisiana corporation from the partnership, are thus seen to be.

First.—A new board of trustees is created, by which two members of the old were excluded, and a new corporation composed of five gentlemen who were members of the old board, and two others were created into a new corporation. This new corporation was not contemplated by the Louisiana charter.

Second.—The deprivation of the Louisiana Board of its right of visitation and *pro rata* control of its funds so carefully reserved by its charter, and the conferring

of the supervision of its funds nominally upon another set of persons, but really giving them to the uncontrolled management of the new Kentucky Board But there are also other violations of the charter such as, imperil the safety of the funds, in the hands of the treasurer and the loans upon mortgage security

See Shields vs. Ohio, 95 U. S., p. 324-5 as to good faith, &c.

See also Bisset on Partnership, p. 88, Sec. 9, marginal paging.

IV. *This right of visitation is a valuable right*

Allen vs. McKean, 1 Sumner, R. 300-301,

Fuller vs Plainfield Academy, 6 Conn., 545, 546.

V. The impairment of *any* of the rights secured by a charter is a matter of judicial concern.

Montpilias' Academy vs. George, 14 La. Reports, 404.

Dartmouth College vs. Woodward, 4 Wheaton, R. 518, 525.

Railway vs. Allerton, 14 Wal., 235.

Marlborough M. Co. vs. Smith, 2 Conn., 583-4.

"The largest and least (impairment) are alike for-
"bidden.

"The objection to a law on the ground of its im-
"pairing a contract, can never depend upon the ex-
"tent of the change which the law affects in it."

VonHoffman vs. City of Quincy, 4 Wal., 552.

Potters Dwarris's on Statutes, p. 447.

Field on Corporations, p. 6, sec. 3; p. 171, sec. 155, p. 243, sec. 227.

So Angel & Ames, Ed. 1846, pp. 613-4.

"The visitorial power over colleges and schools in this country, together with all other powers, franchises and rights of property belonging to them, are usually vested in Boards of Trustess or overseers, established by charter who have permanent title to their offices *which can be divested only in the manner pointed out in their charter.*

VI. The following cases show that stockholders and subscribers to corporations are not bound for their subscriptions where there have been changes made in the charters afterwards.

Hartford & New Haven R. R. Co. vs. Groswell, 5 Hill, 385-7.

Macedon & Bristol Plank Road vs. Lapham, 18 Barbour, 315.

Middlesex Township Co vs Locke, 8 Mass, 268, 272.

Ships case, 2 DeGex, Jones & Smith, 544, 67, Eng. Chy. Rep.

VII. The St. Johns College case, 1 Burrows, 158, cited by our adversaries can have no application to cases arising under the constitutional government of the United States, unless it be shown that the new foundation *is rightfully engrafted* on the old.

Complainant's counsel say, p. 16, of their brief, "and if the statutes of the foundation direct the mode "in which the visitorial power shall be exercised that "mode alone must be followed."

Phillips vs. Burey, 2 T. R, 348

It seems to us that such is the doctrine we are contending for ourselves. The foundation, especially the

Louisiana charter, expressly adopting the tenth section of the Kentucky charter as an essential part of its own, requires the board of visitors to look after the funds of the various co-operating corporations to consist of the presidents of those bodies. We therefore say no other mode is binding on the Louisiana Board.

The reference to the tenth section of the Kentucky charter made it a part of the Louisiana charter.

The "powers and principles (of a corporation) may "as well be designated by references to the charter "of other companies as by special enumeration." See Railroad Co. vs. Maine, 96 U. S., 510.

The other cases cited by complainant's counsel, viz. 4 Wheaton, 674; 18 Pick., 338, and 7 Pick., 303, seem to sustain the rights of the Louisiana Board. *The act of* 1861 *has a general repealing clause* (p. 51, sec. 11), and repeals the old provision of the act of 1858.

VII. The complainant's counsel seemed to think there might be a trust created in favor of the complainant, although there was no privity of contract, nor anything similar thereto, existing between the defendant, a corporation created in 1859, and the complainant which was not created until 1861, and does not in any way fill the bill (if we may be allowed to use the expression) required by the Louisiana charter.

Baptist Association vs. Hart's Heirs, 4 Wheaton, 1.

If the complainant cannot take, there is no reason to discuss the question, whether the old Kentucky Board, if it had existed until now, and had preserved the charter of 1858, could have claimed the fund as a trust fund in the hands of the Louisiana Board. It

would, however, in such case, have been voluntarily sent from time to time, revenue or principal, as the best interests of the blind required.

There cannot be any doubt that the right given by the 4th section of the Louisiana charter, was a legal right to the property which it might acquire. It had the right to *hold and use the property* (p. 138), and sue for and defend the same. Hence, as we have already said, the party who will take it away from us must have a superior right and must come into a Court of equity with clean hands. And it must not seek to take advantage of its own wrong.

It is supposed by complainants' counsel that a trust may be created by articles 1890 and 1902 of Civil Code. But these articles of the Code, suppose *a contract* between persons capable of contracting *has been entered into* for the advantage of some third person.

What contract was ever made between the *defendant* and *complainant?* What contract was *made between* any one of the *donors* on defendant's list of subscribers and the present Kentucky Board? Take John Burns, the first paying subscriber on defendant's list, (p. 125), who paid *five* dollars. What bargain did he make with the then Kentucky Board, or with the Louisiana House, out of which an action would be in favor of the present Kentucky Board? How much of his five dollars actually reached the *defendant* after commissions and expenses were paid? Could the new Kentucky Board sue to recover the unpaid Louisiana subscriptions? Lest the Court might be misled as to the face of article 1902 of the Civil Code, we desire to say that it means nothing more than that after such accept-

ance, the contract is complete, just as the acceptance of an offer to sell completes the sale. It never meant to say that a party violating equity, could claim the benefit of an equitable action in spite of such violation.

And so it has been adjudged. The Court says:

"These articles, however, do not stop the person making the stipulation from settling up equities; and the right to do so must be determined by a recurrence to such general principles of *law* and *justice* as regulate the subject of contracts, and especially the contract of sale. Union Bank vs. Bowman, 9 Ann., 196.

In another case under the article, the Court said: "It is not shown that the plaintiff had any knowledge of those misrepresentations; still, he now sues in affirmance of Miller's contract, and he cannot have any greater rights under it than Miller had."

Freligh vs. Miller, 16 Ann., 400.

The doctrine that the stipulation *pour autrui* is open to all equities was again affirmed in Lapene & Ferre vs. Delaporte, 27 An,, 252.

It is therefore very clear that the *Louisville Board could not have any greater rights against the Louisiana Board than it would have had if it had been in esse and had made a contract with it in its own name.* And we have already seen that the Kentucky Board, after *violating* the agreement in such essential particulars, could not enforce it against another.

The complainants bring forward, on page 22 of their brief under division C, another supposed ground of title for recovery. They say that the defendant is *estopped* from contesting their title because, they say, that when Thomas A. Adams, the president of the Louisiana

created by statute in 1861, merely because it has taken the name of the old board, they are made to assume another garb, and so dressed up, they create an erroneous impression.

But were the answers, made under these circumstances, an actual recognition of the new corporation of 1861, it would not be the equivalent of a title or the transfer of the rights of the Louisiana Board, to the new Kentucky Board, for these reasons:

1st. Thos. A. Adams has been interrogated under interrogatories *in this very case* in regard to those answers, and he swears that, "if there is any admission "of complainants' rights, it was made under the er- "roneous impressions produced by complainants' "agents." Rec. p. 20. He swears further that there *was no other admission* made by him or in the suits then contained in exhibit (one), page 22. And this statement in the answers is fully borne out by the testimony. *It is uncontradicted.*

We then have the answers of the same witness in this case, explaining the answers in the Foley case, *called out by complainant.* It is not now in the power of complainants' counsel to ignore these answers in this case which they expressly called for and obtained, *without showing that they are untrue*, which is impossible

They have chosen to interrogate Thomas A. Adams about these very answers, instead of relying on them as supposed legal evidence *per se*. He has answered as he was required to do, and the case stands as in the case of a promissory note in the Louisiana law, where a party, interrogated whether he signed the promissory note answered, that he did, but that there was a failure

of consideration which he sets forth. The party propounding the interrogatory, is forced to overcome the case made against him. He can not ignore the answers which he has compelled the other party to give. See Haynes vs. Heard, 3 An. Rep. 648. So here the complainant cannot set up a supposed admission which has already been destroyed and overthrown by the answer.

2nd. But the supposed admission does not in fact exist. A fair construction of the answers, does not bear the conclusion sought to be put upon them. The answer to the first interrogatory shows clearly that Mr. Adams was speaking of the old charter of 1858, under which the resolution of the Kentucky House of 29 February, 1876, purports to have been formed, claiming organization under said charter of 1858. Rec. 122.

3d. But if the *admission* had really been made it would have bound no one.

As rigorous and universally harsh as the Louisiana law really is as to the judicial admissions, it will not quite sanction the doctrine laid down by the other side. It does not allow parties to avail themselves of benefits derived from their own wrong, and admissions made under error of fact, are not binding.

See sec. 4 of art. 1846, code of 1870, and art. 1840 of code of 1825.

"4. A judicial confession of a debt shall not be "avoided by an allegation of an error of law, *though it* "*may be by showing error of fact.*"

Paragraph 4 of art. 2291 of code 1870 and 2270 of

code 1825, speaking of judicial confessions says: "It "cannot be revoked unless *it be proved to have been* "*made through error in fact.*"

This exception is available between *parties sui juris*, and much more is it applicable when the answers are only in the nature of evidence and made by one not having full power to represent the corporation and between other parties, and on other issues. A judgment even, one way or the other in the Foley case would not have been *res judicata*, or proved anything here.

The Louisiana law excepts admission made in error, even as between the parties. The cases cited by the complainant from the Louisiana Reports, are *cases of pleading* and between the *same parties*, and did not come within the exceptions mentioned in the above recited articles of the Louisiana Code.

In the case of Ethel vs. Holmes, 8 Rob. 136, the Court enforced the admission; the defendant who had made an admission in the first answer sought to amend it. The Court say: "*The defendant has not attempted to* "*show any error in this statement* (alluded to in the first "answer) *nor any imposition on him by the plaintiff*," etc., thus clearly recognizing the fact that if either of these facts had appeared, the Court would have relieved the party against the admission.

The Supreme Court speaking of the *pleadings* made in error by the agents of corporations, says: "In con- "formity with the views expressed in the case of Mil- "laudon vs. First Municipality, 1 Ann., 215, we would "not in any case of which we have the control, be dis- "posed to hold the corporators responsible for the "errors of their agents in pleading or in defending

"suits," but here, etc. Delabigarre vs. 2 Municipality; 3 Ann., 236. See Smith's Commentaries on Const., p. 620, sec. 467. See also Decamp vs. Robbins; 2 Stewart, N. J. Equity Rep. 6 Cent Law Journal, p. 450.

But we suppose this case will be governed and tried by the rules in equity. Still we intend to show that the complainants could not succeed even by pushing the Louisiana law to extremity. As Mr. Sumner says, courts of chancery have often gone great lengths in relieving against want of form and mistakes in pleading in proceedings on behalf of charities. See Atty. Gen. vs. Whitty, 11 Ves., pp. 252; Note 1.

Again, we are not aware of any case where it has been held that the answers of any one of the officers of a corporation to interrogatories on facts and articles in a suit is absolutely conclusive on the corporation. The plaintiff may call on any of the officers to answer, and it would be strange if answers of any individual officer of a corporation, selected by a plaintiff could be pleaded as an absolute bar and operate as transfer of rights and property which could otherwise only be conveyed by the action of the whole board after having been duly assembled. For by the civil law the *conclusum universitatis* can only be found after a meeting of the corporators where all can be heard. Mackeldey Partie Generale, Sec. 148, No. 5, Brussel's Ed., 1846; Kaufman's Ed., p. 147-8.

In conclusion on this branch of the case, the fault seems to have been with Mr. Adams and E. T. Merrick in being so credulous as to believe Mr. Barret, who denied the statements formerly made by Mr. Sherrod, and who produced the resolution of the Kentucky

Board, declaring that that board was organized and acting under the charter of 1858, which also Mr. Barret positively affirmed was the case. But when the resolution of 29 February, 1876, of the Kentucky Board was placed before these gentlemen, Mr. Barret was understood to be the president of one of the Louisville Banks and otherwise occupying an honorable place in the estimation of the people of his own city.

IX. As it respects the charges in the answer of collusion between the present Louisville House and the donors provoking this litigation, there is too much appearance of truth in the charge, to be passed by unnoticed. An attempt has been made to avoid its force, by saying that the proposed partition of the funds could not take place without the consent of the Louisiana Board. This is evasive; the charge is that these parties are in collusion to recover and divide the fund, and to avail themselves of the case or cases, whether in the Circuit or State Courts, most conducive to this end. It is true that an attempt was made to induce the Louisiana Board to give up the funds, for such division without further controversy, but that failing, did not defeat the agreement between these parties, concerning which this defendant was informed it had nothing to do: The reason still to believe the charge is:

1st. The effort of these parties in concert to induce defendant to give up the fund; their effort in 1877, in concert to have the fund removed from the bank, into the United States Court, and recognizing among themselves complainants' right.

Their motion begins in these words: "On motion of "John H. New, solicitor for complainant and of

"Richardson & Magruder and Thos. Hunton, solicitors "of H. B. Foley, *et als*, and on suggesting that the de- "fendant, the Louisiana Board of Trustees for the "blind has made a judicial admission that the funds in "their hands amounting to $; of right belongs "to complainant or that complainant is entitled to the "same and that there are no other parties or persons "claiming the said fund, in the hands of the Louisiana "Board, than complainant and said Foley and others * * * it is ordered etc." Print. Rec. p. 10.

2. The statement of one of the parties, that it did not make any difference to them whether the Louisville House or the donors should succeed, *they* would be successful all the same.

3. The letter of Col. New, complainants solicitor, Nov., 1876, to the Sixth District Court (which was not considered as having any friendship for the Louisiana Board), that he had no objection to the trial of the Dupuy case in that Court, when the only parties to the same were Dupuy and this defendant. Rec. p. 112, Trans. 379, 380.

4. The abstaining, after November, 1876, from rendering any assistance to this defendant, in defending the harrassing and vexatious suits brought by individual donors, in the various State Courts, where, so soon as any one Court could be found to decide in favor of any one donor, all the others might bring suits in that Court, the appellate jurisdiction of the Supreme Court not extending to sums below $500. P. 114.

5. Praying, through the then solicitor of complainant, who, under the State practice, had been appointed an attorney (*curator ad hoc*), for the dismissal of the in-

junction-suit, brought by this defendant against Dupuy and others, *when that injuction was vital* to prevent dissipation and loss of the whole fund. P. 152, Trans. 509.

6. The procuring from the said attorneys, representing under special powers of attorneys certain donors, and presenting the same to this defendant, the letter dated 21st Nov., 1876, marked J B. (p 102) authorizing the payment of the funds to the present Louisville House.

7. The fact that the few donors made parties, and their counsel have made no serious defence to this suit. They have not even propounded across-interrogatory; and it would look as if there was some purpose in the irregularity of their pleadings. This course of conduct corresponds with the prayer of their solicitor to dismiss the Dupuy injunction-suit which was done in the Sixth District Court as prayed for. The fund was only saved on an appeal, by a reversal of that dismissal, by a decree of the Supreme Court. See petition, p. 146. Prayer of the answer of Moise, complainants' solicitor, 152. Opinion of Supreme Court, p 157. See whole case as reported, Louisiana Board of Trustees vs Dupuy, 31 An, 305.

It also thus appears that *the three or four donors who have been made parties, have not seriously intended to press their supposed claims in this suit.*

X. We have seen, that complainant out of the *nine* hundred donors, has made only Foley, Dupuy, and N. Cropper and "Henry C. Dibble assistant attorney general of Louisiana," parties defendant, together with "Herman B. Magruder and Frank L Richardson, in their own right, and as agents and attorneys, in fact of all

parties preferring claims against the Louisiana Board of Trustees, &c., parties to the bill. The persons represented by Mr. Richardson (who amount probably to about 100) are found on pages 77 to 79 of record, and we are not advised of any proceeding in *equity*, which would authorize those gentlemen to stand in judgment in the place and stead of their clients.

Then again, we have seen that calling an answer in the nature of a Louisiana reconvention, a cross-bill does not make it such. In this case in its commencement it is styled an answer. See Rec. p. 9. The prayer of the answer, we have seen, is for judgment against this defendant. No process was prayed for or served and no notice taken by this defendant or the complainant of the anomolous paper. The only issue, therefore, is (as we have argued), between complainant and this defendant.

It therefore becomes useless to discuss the relative rights of the Louisiana donors and the Louisiana corporation. Our recollection is, without a recount, that there are over nine hundred donors, and Messrs. Richardson and Magruder, it is said, represent say, one hundred, and that the other eight hundred make no complaints. If the party who had been paid by the Board to collect the donations, acting with a paid State Superintendent in order to get fifty per cent. more, had directed his and their attorneys to give in their circulars, the name of the institution to which the donations had been given, it is not probable that so many powers of attorney from donors would have been sent. But the name of the institution was left in blank, and to be returned to New Orleans. See circular page,

Print., R. 106. Some of those who gave the powers have withdrawn them.

The Louisiana Board expects to be able to deal with this question when it comes up in a proper form to be tried. An attentive consideration of article five of the Louisiana Charter, shows that the condition relied on by litigating donors, is in the alternative. The raising of the $25,000 in seven years, rendered the donations absolute under the civil law.

The condition was evidently adopted by corporators on these suppositions, viz:

That the $25,000 might be raised in seven years, and if so, the sum itself, by its magnitude would insure the success in the enterprise, or that $25,000 might not all be raised, and yet the different corporations might go to work and expend the money collected on the buildings before the end of seven years; and if this should happen, then two more years were to be added, and if the Publishing House should be established within nine years, that was to suffice.

It is not in the power of the donors to make a new contract at this late day. The Civil Code sanctions this mode of alternative contract by express provisions, and it has defined the meaning and legal force of the word "or" in the charter. Code of 1825, art. 2061; art 2066, Code of 1870: "But where things which "form the subject of the contract are separated by the "disjunctive, then the obligation is in the alternative. "A promise to deliver a certain thing, or to pay a spe- "cified sum of money, is an example of this obligation."

Art. 2062, art. 2067, code of 1870: "The debtor in "the alternative obligation is discharged by the deliv-

"ery of one of two things, that are comprised in this "kind of obligation." And so it was in the ancient civil law.

Ubi verba conjuncta non sunt, sufficit alterutrum esse factum. Pandects de Regulis Juris. No. 10, section 3 (ff. lib. 50, tit. 17, lex. 110, §3). See also 6 Toulier, p. 719, sec. 689.

Without pursuing the question further, we assume that under the civil law, the raising of the $25,000 within seven years, vested the fund in the trustees, absolutely.

As the question is not at issue between any one and this defendant, it is unnecessary to discuss this point further. Were there serious grounds of complaint against this defendant, the government of Louisiana, would doubtless institute proceedings for the forfeiture of the charter, and liquidation of affairs.

The charges made by the Kentucky Board against the Louisiana corporation would imply the most fastidious conduct on the part of the former.

Perhaps they can point with just pride to what they have done, nevertheless they might have done some other things with great propriety. They might have acted in good faith under the charter of 1858, and have permitted, the Mississippi House with its $14,000, and Louisiana Board with its $16,000 *in money* to have had an equal voice (as it was originally understood) with the Kentucky Board with its seven thousand four hundred dollars *in subscriptions*.

Or, if it was determined to control the assets as more desirable than the assistance of these corporations, the new Kentucky Board might have acted, as fairly as

business men are expected to act, and to have officially informed the Louisiana Board of the change of charter instead of keeping the change to themselves, and through their agents denying the existence of such changes.

Indeed, we have looked into complainant's accounts. furnished in this case, pages 41, 43.

Instead of impressing us with the same veneration (as evidently animates the witnesses for complainant) it strengthens the impression that it was wise to insist on the right of control intended by the original charter of the Louisiana corporation.

We find that $40,796 52, according to their own showing, have been given by contributions to the present Kentucky Board, about *seven* thousand dollars of which was raised by Kentucky.

The books returned, for this large sum (excluding those sold) amount as we make it to 5003 volumes out of which it appears the board gave to Kentucky 3080 volumes on account of her $7000, and to the other States for $33,000, only 1923 books. See Print. Rec. pp. 41, 43. That kind of a partition would probably be unsatisfactory in the long run, to any board specially organized to look after this work, and furnishing the largest proportion of the money to carry on the work.

XI. It may be asked what the Louisiana corporation proposes to do with these funds. It may be replied that the primary object was to procure *books* in raised letters *for the blind* of Louisiana. *The place* can only be a secondary affair. The testimony of Messrs. S. P. Ruggles and Bradford, of Boston, and Kneass, of Philadelphia, show that the Louisiana Board can es-

tablish a superior printing press with the funds which they now have.

They have exercised their right to invest the money, and the income will enable them to buy books for the blind where they can make the best terms.

The officers of the Kentucky Board are naturally enough prepossessed in favor of their own printing press, but it must be remembered it was invented by Mr. Ruggles, who, after much experience, has made improvements since, inventing the press for the Printing House.

He has offered the Louisiana Board machinery on excellent terms. Books can be printed at Mr. Ruggles' press cheaper than elsewhere in the country. Print. Rec. 66-69; and at Mr. Kneass, in Philadelphia, as cheap as at Louisville, p. 73. Or, the Louisiana Board may buy books from the Kentucky Board, as it has already done, and pay for the same or make some other contract.

The merits of the respective inventions of Mr. Ruggles and others, are fully discussed in the speech of Hon. Benj. Dean, on the education of the blind, in Congress, June 18, 1878. See Congressional Record of that date.

We do not see any reason why the Louisiana Board could not establish their press at Louisville if it should deem *the place* of any moment, in order to satisfy those who consider the form, more than the subsistence of things.

Again, the Legislature of Louisiana has taken the fund in charge and interposed to have so much of it as shall not be recovered, by donors, paid into the State Treasury, for the benefit of the blind at Baton Rouge.

See act, p. 118, demand of the treasurer on this board. p. 117.

The fund had increased so rapidly up to 1876, when the interest was stopped on account of this litigation (p. 144), that it has brought out a number of eager litigants, every one of which is ostensibly actuated by the most benevolent motives. The gentlemen who attempted to get one-half, or $15,000, by stirring up the donors, are both blind. (We are not speaking of their counsel, in whose names the circulars were sent.) The Assistant Attorney General, assisted by the same counsel, brought suit in the name of the State against this defendant and enjoined it from paying over the money to the plaintiff.

Vexatious suits were brought by individuals before the First Justice of the Peace, in the Fourth District Court, in the Fifth District Court, in the Sixth District Court and in the Superior District Court of New Orleans. P. 15, 110, 115. The defendant without filing answers, excepted to each of these various cases on the ground that one individual donor could not sue the Louisiana Board without making all parties in interest, parties. But the judge of the Sixth District, held that any donor could sue the corporation. No appeal would lie to the Supreme Court on any demand under $500. Fortunately the interest standing in the name of the law firm under the contracts with the certain donors gave an appealable quality to an injunction—suit which could be commenced in the Sixth District Court to enjoin these parties from bringing harassing and vexatious suits, without making proper parties; this defendant offering to litigate the questions in any one

Court, where all persons claiming interest could be made parties. Of course it was expected that the Sixth District Court would dismiss the injunction suit, which the complainant, through Mr. Moise, then its attorney in this case, singularly enough *prayed might be done.* Exceptions were filed by the other defendants, and the injunction-suit was dismissed. On appeal to the Supreme Court, it was decided that the suit could be maintained, and a mode of settling all controversies in reference to the fund indicated.

See petition, pp. 146-150. Opinion of Supreme Court. pp. 157-159.

The pendency of this suit in the Federal courts, makes that litigation in the State Court, impracticable for the present.

In reading the testimony your Honors will find, that Messrs. Bullock, Barret and Huntoon, complainant's officers and witnesses, in their depositions (the former especially) go beyond the line of legitimate testimony to indulge in reflections on the motives and conduct of the defendant's board of trustees. It would have been better if they had spoken of something that they really knew of their own knowledge

In this community such remarks would be entirely harmless. Dr. W. N. Mercer, the first President of the board, who died in 1874, was one of the most benevolent and noble men New Orleans ever had. The admirable St. Anna's Asylum for widows and orphans was built and given by him while he lived, and liberally endowed by his will to provide revenues for its support after his death. Mr. Adams, the present venerable president of the association, is well known for his

gentlemanly qualities, liberality and charity. The other gentlemen of the board are high minded honorable, well known men, in whom the whole community repose trust and confidence.

The carrying the fund safely through the war and disastrous times following, whilst so many most promising private institutions and fortunes have failed, and being able to show an accumulation of fourteen or fifteen thousand dollars without one cent cost to the fund, or one dollar's loss, are good evidence of the integrity and good management of the board were there none other.

It is clear that purer hands cannot be found to take charge of the fund. If they succeed in extracting the institution from the destructive litigation, which is attempting to pull it down, as wolves do some noble animal, they will be able to carry out most amply the substantial objects of the Louisiana people in providing a Louisiana institution to procure books for the blind.

XII. In conclusion, we respectfully submit that the complainant has failed to show any equitable or legal right to disturb the fund, which has been in our hands unchallenged by them for over fifteen years, and that the judgment of the lower Court ought to be affirmed.

E. T. MERRICK, and
GEO. W. RACE,
for Appellees.

OFFICE SUPREME COURT U. S.
FILED
DEC 20 1880
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

THE AMERICAN PRINTING HOUSE OF THE BLIND BOARD OF LOUISVILLE, KENTUCKY,

versus

LOUISIANA BANK OF TRUSTEES OF THE AMERICAN PRINTING HOUSE OF THE BLIND.

Appeal from Circuit Court in Louisiana.

J. A. CAMPBELL,
Solicitor for Defendant.

Clark & Hofeline, Brief Printers, 112 Gravier Street.

Supreme Court of the United States.

THE AMERICAN PRINTING HOUSE OF THE BLIND BOARD OF LOUISVILLE, KENTUCKY,

versus

LOUISIANA BANK OF TRUSTEES OF THE AMERICAN PRINTING HOUSE OF THE BLIND.

Appeal from Circuit Court in Louisiana.

MATTERS OF FACT.

The defendant in the Circuit Court and appellee in the Supreme Court was possessed of a fund amounting to about $30,000 when this suit was commenced in May, 1876. This sum was composed of money contributed by a large number of persons to agents of the defendant amounting to $16,136.22-100 and interest on that sum while deposited in the Louisiana Savings Bank, from 1862 till 1876, the date of this suit. The only testimony of the cause of the contribution is to be found in the charter granted to the defendant under the statute of the State. Rev. St. 56, § 677–682.

The object of the corporation is declared to be a desire to aid in the permanent establishment of a printing house for the publication of suitable books adapted for the use of the blind, within the United States, and the

trustees reserve a power to participate in the management of the work to be carried on.

The charter provides that the corporation may hold property to the value of $100,000.

The fifth section of the charter provides that money shall be collected and held until a sum of $25,000 shall be raised, and that when the defendant is officially informed of this they shall remit the funds and properties they shall have received, to the trustees of the printing house at Louisville, Kentucky, in such sum, as may be required to establish and carry on the printing house in that city.

The charter provides that if $25,000 were not collected in seven years from the date of the act of incorporation (14th of January, 1859), or if the printing house were not established in nine years, that the money subscribed and paid should be restored to the donors. There is a special reservation of visitorial powers over the Kentucky house pursuant to a clause in a Kentucky charter, and a share in the management of that institution whenever it should be permanently established and prepared for work.

Record, pp. 137–8, Exhibit K. K. C., Rec. 24.

The money subscribed remained in charge of the Louisiana corporation until 1876.

During the period of seventeen years from the date of the charter, there was no connection or intercourse between the paintiff and defendants, between the Kentucky and Louisiana corporations.

The first communication of one with the other, bears

date 29th February, 1876, when a notice was sent by the plaintiff to the defendant that on and after the first of May, 1861, there had been obtained subscriptions amounting to $25,000, and invited the Louisiana board to combine and co-operate.

Rec. 24, p. 78–9; Rec. 137.

But the reports of the board in Louisville show that on the 31st Dec., 1865, there had been from the origin of the company, only two thousand and one dollars in the hands of that board, and that the subscriptions in Kentucky amounting to near six thousand dollars nominally, had yielded no result in money.

Record, pp. 53–54; Record, p. 159–160–165.

At this date there had been no communications received from any of the States of Mississippi, Tennessee or Louisiana for five years, and there was uncertainty and ignorance as to the state of funds arising from individual or legislative appropriations.

Record 53, p. 159–165.

The testimony is uncontradicted that the defendant did not for *ten* years after the date of the first annual report of the Kentucky corporation on the last day of the year 1865, have any connection with the plaintiff or any intercourse. The first evidence of a disposition to intercourse was on the adoption of the resolution of notification in 1876. Before that time there was, perhaps, an inquiry, or some conjecture, that there might be a cause or a motive for a connection, but nothing beyond.

In March, 1876, Barrett brought the resolution marked D. O., Rec. p. 122, and presented it to the Louisiana

Board. Record 80. Up to that time the money was nearly all on deposit with the bank. Record, folios 304, 321, 323, 332, 362, 367.

The collections in Louisiana seem to have been completed in 1860–1861.

It is to be observed that in January, 1861, the ordinance of secession was passed by a convention of the people of Louisiana, and the war existed from 15th April after, until the proclamation of the President, in April, 1866. During all the period between the 15th April, 1861 and March, 1866, there was a civil war. For much of the period there was a prohibition of intercourse and connection by the authorities dominating in the two States.

It is clearly established that no corporate act done by the defendant, and no communication or co-operation or Confederate Union had taken place, when the resolution passed in 1876, was exhibited. In making a statement of facts I leave out of this statement, the acts or solicitations of contributors and donor, or of stimulating attorneys to establish a title to a reversion and a return of the contributions and donations, except to state that the litigation originated in those acts, and the litigations are still prosecuted.

That a large number of the donors have complied with the proffers of the attorneys to bring suits.

Richardson, Test. pp. 77–8.

And that their suits are pending in the State courts, and that measures have been taken to have a determination of their claims to these funds by convening all the parties interested.

Record, pp. 15, 157; fo. 526.

It is also proper to call the attention of the Court to an enactment by the General Assembly of the State, requiring the payment of the money into the Treasury of the State and its use for the blind of the State. This act shows that the State determines that these contributions were made for a charitable object which has failed and designates an object analogous to that specified in the charter of incorporation. This act was approved, pendente lite.

Record 118, 119.

The record shows that Wm. D. Sherrod was the originator of the plan of assisting the blind population by making a provision for publishing books, by contributions, to be managed by auxiliary corporations in different States, having a connection with a corporation in Kentucky, where the printing house was to be established. The first legislation was by the General Assembly of Mississippi in November, 1857. The act of that assembly preceded the action in Kentucky or Louisiana.

Record 119, 120–1.

The Louisiana incorporation, followed upon the adoption of the first act in Kentucky. Action was taken in Tennessee likewise.

Record, folios 363, 367.

PLEADINGS AND EVIDENCE.

A bill and an amended bill were filed by the Kentucky corporation. Some of the contributors came into the suit as defendants and filed a cross-bill, asserting

tion passed by the board of trustees on 29th February, 1876, and printed in two folios of the record of this case. Record, p. 24–34.

It is to be observed that the board speaks in the resolution of "*actual subscriptions*" by persons as if a *subscription* fulfilled the conditions of the charter of the defendant as to the sum of money to be raised in seven years from the date of the charter, January 14, 1859.

The reports of the Louisville board contained in the record show conclusively that the sum of $25,000 was not *raised*. The *first report* of the board is dated December 31, 1865, only fourteen days before the expiration of the seven years. At that date the entire receipts had amounted to two thousand and one dollars ($2,001) and no more. The entire expenditures had been but $912.34. This report includes all from the origin of the institution in 1858.

Record, p. 53, fol. 176.

The fifth report of the board is for 1871 and 1872, and was rendered in 1873. This report furnishes a statement of all receipts from the beginning. The sum mentioned in the first report is stated and collections were made in 1866, 1867, 1868, 1870 and 1871, amounting to abont $7,000 more—the larger portion was collected during 1866. Record, p. 163.

The Louisiana collection of $16,136.22 was deposited in 1860 and 1861; interest at the rate of 6 per cent. was allowed from November, 1862, till November, 1866—no interest during the war besides. Record, p. 23.

No reference is made to this sum in the reports and no claim set up to it.

IV.

It fully appears that the defendant has entered into no covenant or agreement with the plaintiff. The defendant has not attorned to the plaintiff as owner, chief, or as authorized to command the disposition of the moneys specified in the bill. The money has been controlled, managed and disposed of by the defendants.

The defendant is not responsible to the plaintiff but to their constituents, the donors and subscribers.

The rule is, when money is sent to one person to be paid by him to another to enable the person who is the object of the remittance to maintain an action against the deposit, there must be a consent on the part of the latter to pay over the money to the former, or to hold it to his use. If the amount remitted be a gift or a donation founded upon no precedent consideration, debt or obligation, the authority may be revoked at any time.

Add. on Cont., 7 Eng. ed. p. 26.

The donations were made to the defendant. They become the property of the defendants when paid to them. The power of disposition and control was delegated to the defendant without responsibility to the plaintiff. There was no priviity or intercourse between the plaintiffs and the contributors or donors.

The charter of the defendant states the motives of the corporators in the preamble and in the article. The predominant motive was to alleviate the condition of the blind persons in the country and in the State, and this corporation was formed to assist by co-operation with an

incipient and unshapen scheme. There was no obligation nor trust created by the act of incorporation.

There was none by the subscription papers. There was none of the collections made by the defendant in 1859, 1860 and 1861; none by defendants, the Savings bank, in 1860 and 1861. There was simply a purpose manifested to obtain the means to create or execute a trust at some period at least seven years afterward, and dependent upon conditions which were contingent and uncertain.

The active parties are the signators to the act of incorporation (R., 137, 8, 9) and their successors.

The capacity to hold property by donation, bequest, purchase or otherwise, exists under the 4th article. They declare that they will hold the funds and properties until the sum of $25,000 is obtained for the proposed object. and under contingencies occurring they will remit them to the trustees of the American Printing House for the Blind at Kentucky.

The sixth section contains reservations of authority and administrative powers, which had been secured to auxiliary institutions in the Act of the State of Kentucky, approved in 1858. Record, pp. 46, 47, 48, fol. 159.

It is seen that these corporators are declaring a law to themselves, and are not contracting an obligation in favor of the plaintiff.

The plaintiff in their reports in 1855, 1873 and their resolution in 1876, do not assert the existance of a covenant, or of any vinculum juris, whereby the defendant is bound.

V.

As between the subscribers to the funds of the defendants, and the defendant, the donation became operative by the payment of money. A manual gift is perfect by a real delivery; all other donations will only be valid by an act passed before a notary and two witnesses, whether of movable or immovable property. Rev. Code, Arts. 1536, 1538, 1539.

The defendants did not in the fifth article prescribe to themselves an absolute duty to pay over the sums under this contract. The language of the section is "that so soon as the trustees are officially informed by the trustees of the American Printing House for the Blind, at Louisville, Kentucky, that the sum of twenty-five thousand dollars has been raised, they shall remit the sums and proportions received by them to said trustees at Louisville *in such sums as may from time to time be required to establish* and carry on said publishing house."

We have seen that this notification by the trustees in 1876 did not describe money *that had been raised*, but only of subscriptions which had not been productive of money.

Who was to make a decision of the sums to be remitted from time to time?

VI.

The defendants in Louisiana evidently did not regard their relations in reference to these funds as a mere agency for the benefit of the plaintiffs.

They evidently regarded the money as belonging to themselves for the aims set forth in the charter and that they were to appropriate it as they considered to be prudent and proper.

They were to participate in the "supervision and administration of the affairs of the corporation in the accordauce with the prvisions of the 10th section of the act of 1858.

It is seen by that section that the president of the boards of trustees in each State were to constitute a distinct board of visitors; that this board was to be convened upon the demand of a majority of that board and three-fourths might remove a trustee.

But subsequently to the adoption of the defendant, the 10th section of the act referred to was radically changed.

The board of visitors established by the amended act is composed of the superintendents of state institutions devoted to the education of the blind; the Governors of States that aid in sustaining the American Printng House; and the president of the State auxiliary boards of trustees in which last class the defendants would be included. The charter of their incorporation excludes the two classes of superintendents of schools and governors of States.

The defendants made no contract with the plaintiff for any purpose. They have been independent, separate, from 1859 till this suit. The plaintiff demand a union, but the plaintiff has caused a repeal of the section of the act which forms a condition of union.

The minds of these parties never came together. There

was no intercourse before 1876. That intercourse did not result in any connection and this suit is to coerce one. The claim is that the change made in the conditions of the charter are unimportant.

The answer is that the defendants were free agents, had contracted no obligations to the plaintiff and had conferred no authority upon them and may therefore insist upon the maintenance of their conditions. Moreover the change is material. It affects the organization and composition of the board, which alone can enforce fidelity and responsibility in the agent employed to do the work.

Were this suit to be successful a large proportion of the actual capital of the enterprise would be furnished by the defendant.

VII.

There has been no appeal from the decree dismissing the cross-bill. The case of the donors and contributors is not represented in this record. Therefore there is no occasion to discuss the questions presented by them.

Nor do we deem it important to consider the disposition made in the act of the legislature of Louisiana, in favor of a State institution.

J. A. CAMPBELL,
Solicitor for Defendant.

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Filed

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1880.

No. 598.

AMERICAN PRINTING HOUSE FOR THE BLIND, APPELLANT,

vs.

LOUISIANA BOARD OF TRUSTEES ET AL., APPELLEES.

REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF, BY E. T. MERRICK AND G. W. RACE.

E. T. MERRICK,
G. W. RACE.
Of Counsel for Louisiana Board.

HINTON & MASON PRINT, MASONIC HALL.

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REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF, BY E. T. MERRICK AND G. W. RACE.

Lest it might be supposed that we acquiesce in the assertions of counsel in the supplemental brief, we take occasion to say we deny the accuracy of this supplemental brief, as decidedly as we did the original brief.

Counsel for complainant say, in answer to Judge Campbell: "Mess. Merrick & Foster, counsel for the same Trustees, claim to the contrary, at pp. 48, 49 of their brief. They say that the *complainant* did raise

this sum within seven years, and made the gifts absolute."

We deny that our brief makes such admission. We distinguish, all the way through, between the old corporation of Kentucky and the new one, but we have never admitted, (that we are aware of,) anywhere that either the old corporation or *complainant* raised the $25,000. *To this day*, Kentucky has raised, we believe, only about $7000 for the Blind against, say, $30,000 for Louisiana and perhaps $25,000 by Mississippi, for the same kind of charities. Indeed, on page 49, we say: "They" (the old Kentucky Board) "might have acted in good faith under the charter of 1858, and have permitted the Mississippi House with its $14,000, and the Louisiana Board, with its $16,000 *in money*, to have had an equal voice (as it was originally understood) with the Kentucky Board, with its seven thousand four hundred dollars *in subscriptions*."

As to the quotation from the answer, the whole sentence ought to have been quoted, showing that the partial admission was based on a report of Mr. Sherrod, and that the fact was disputed by the donors, and that defendant insisted on the proof by complainant.

It sometimes happens that counsel on the same side differ somewhat in their views of a case. We do not know that this independence of opinion is any detriment to the honest development of a case before a Court. Certain it is, that the Court often arrives at conclusions on a line of argument not developed by any of the counsel on either side.

We shall leave the complainant to the benefit of any supposed discrepancy in the briefs of defendant's counsel. If each brief furnishes a complete and adequate answer to complainant's whole case, it will be sufficient if any one of them stands.

We have argued the case, it would seem by complainant's brief, without disputing a certain particular ground which complainant is called upon to prove. We think that we can make this concession, and still have ample grounds of defence to complainant's action. Our colleague, examining the testimony for himself, does not think the point proven, and adds the want of proof as an additional argument.

It is difficult to answer a brief in which there is such a persistent misunderstanding of the argument of counsel.

On page 3, supplemental brief, counsel say of ourselves:

"In other words, the learned counsel argue that compliance by the Kentucky House with the conditions of the instrument in trust divests the donors of their rights, but gives the fund to the Louisiana Trustees instead of complainant. To complainant they say: *you* have forfeited your rights by accepting amendments to your charter. To the donors: *you* have been divested of your rights because the *complainant* has complied with the conditions upon which you subscribed to the charity, and the fund is therefore ours."

Now we deny that the present Kentucky House, not

then in existence or thought of, but organized and chartered in 1861, two years after our charter was formed with new members and a dismissal of certain of the old ones of the corporation of 1858, and long after the $25,000 reported, in 1860, by Sherrod as raised in Louisiana and Mississippi, ever did or could comply with the conditions of the Louisiana charter. We deny that we ever made any such agreement with the *complainant* as alleged, and affirm that the attempt by this new corporation to deprive us virtually of all control of the funds raised by ourselves, is a fraud which justice and equity will perpetually resist.

Again: complainant's counsel say, page 5, same brief, "But it is not pretended that there has been any abuse of the charity."

The counsel asserting this ought to know that we do not admit that the present Kentucky Board is administering the charity in our hands. It never had anything to do with it or the funds of the Mississippi Board, and, we contend, was not in existence when the charter of the Louisiana corporation was framed. As to the charities which the Kentucky Board is administering under its charter of 1861, embracing, as it does, other objects and other restrictions, as we have shown, it does not concern us. We deny that this recently formed corporation has any right to interfere with the Louisiana funds; and we of course disclaim all right to criticise the management of the funds of those who are pleased to entrust them to the

present company. The most we have said is simply that the way the present Board distributes the books paid for by the funds of its patrons, does not suit our ideas of equity. The Kentucky Board has raised, say, about $7000, and has taken 3080 volumes of the printed books. The other States have raised and paid in, say, $33,000, and the present Board has given them only 1923 volumes. The Kentucky Board gets about one volume for every *two* dollars paid in by Kentucky, charges the other contributors *sixteen* dollars a volume. Of course this is not our business, and we only advert to it to say that, when we deal with this new corporation, we desire to have something to say ourselves as to what shall be returned us for our money; and we do not wish to be obliged to wait until one half of the governors of North America can be assembled at Louisville to watch the work of a single printing press and see that justice is done us.

In order to evade the force of the objection which we set up in our original brief, that the annihilation of the old Kentucky Board under the charter of 1858, and the creation of a new corporation in 1861, with new objects, and virtually excluding the Louisiana Board, (created in 1859,) from all control in case of her corporation, could not vest in the new Board any right to the funds raised before its existence, they say that, "If the amendments are unconstitutional, as claimed, they cannot operate to the injury of any one, much less can they be set up as a defence to the action." Page 5, same brief.

We do not claim, and have not claimed, that the amendments to the Kentucky charter are *unconstitutional* under the Kentucky laws. The fact that they are not unconstitutional, makes our objection the stronger.

The intellectual being we expected to cooperate with in 1859 had a fair visage, and was endowed with power to co-operate with us in a certain work which we then contemplated to carry on jointly with it and a Mississippi corporation. After we had made large collections, a new corporation was manufactured by the Kentucky Legislature out of some of the old materials and some new materials. This new corporation we do not know. It is mutilated and deformed. It is not authorized by law and has no power (it is *ultra vires*) for it to admit us to the joint control of funds granted it by other corporations and States upon other conditions.

It is preposterous for this new corporation, which has no existence except under its new charter, to suggest that it, (this new corporation,) may be unconstitutional, and after the old corporation has ceased to exist for nineteen years, and is no party to this controversy, it may be recalled and re-established.

A large part of complainant's first brief was addressed to prove the proposition that the Legislature of Kentucky had the power to amend the Kentucky charter.

And we have contended that this power of the Ken-

tucky Legislature over the Kentucky corporation did not give it the power to violate contracts, express or implied, nor any power to change, alter or modify the charter of a Louisiana corporation domiciled in Louisiana.

It could authorize and compel the Kentucky corporation to decline to accept benefits on the conditions tendered, but it could not compel corporations or citizens of other States to tender them benefits on other conditions than they had chosen to do, nor could it make other contracts or propositions for such non-residents. We have chosen to treat this question just as though the old Kentucky corporation of 1858 had done some act in concert with the Louisiana Board in 1859, showing an acceptance of the co-operation and joint action in contemplation by the Louisiana Board; for even with that concession for argument sake, it does not seem to us that the complainant (this new party) has any case. But in fact, we are not aware of any act done by the old Board during its existence giving it a legal or equitable claim upon the fund in the hands of the Louisiana corporation.

Again, on same page, complainant's counsel says of the defendant or its counsel, that "*confessing, as they do, that complainant has performed the conditions imposed by the instruments of trust*, so that the authors of the charity cannot reclaim their gifts, we submit that the trustees cannot refuse to execute the trust on any of the grounds urged in this case."

We cannot help looking with admiration upon the complacency of our adversaries, which turns denials into affirmations and overleaps all legal obstacles, and sees the color of the rose everywhere.

And they quote the case of Edwards vs. French, 21 Wal. 147, in pretty much the same vein. If this case has any bearing at all upon the matter before the Court, it shows, as it seems to us, that *the complainant* has no rights, but that the Louisiana donors (if the donations have not become absolute) may sue to recover them back, in the event of an utter failure of the trust. In that case, the original owner of the land recovered on the failure of the conditions *upon which that conveyance was to be void.* 21 Wal. 148.

It is charged that there is some collusion between a few of the donors and the complainant, and this citation gives additional color to the facts stated in our original brief tending to establish the charge. We cannot conceive for what other purpose the authority should be cited.

The donors have not appealed, and the only question presented to this Court by the record is this: Has the complainant, a creature of Kentucky law, under its act of incorporation of 1861, *the legal or equitable right* to recover of and take from the defendant, a Louisiana corporation owing its existence to the Louisiana law, the sum of money in the possession of the latter, and held by it, in virtue of the Louisiana law, since 1860 and 1861?

Complainant must recover on the strength of its own title. If it cannot show a legal and just right, and one which equity ought to enforce, then the controversy is ended; and it seems to us that this Court will not stop to consider other questions between the Louisiana Board and its donors which may never be raised. The corporation is in Louisiana, and the Legislature has undertaken its control.

We hope the confident assertions of our adversaries will not mislead the Court.

All of which is respectfully submitted by

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G. W. RACE.
Of Counsel for Louisiana Board.